IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

MONDAY, THE 26TH NOVEMBER 2007 / 5TH AGRAHAYANA 1929

OP.No. 16489 of 1998(K)

PETITIONERS:
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1. P.V.VARGHESE, PROPRIETOR, M/S.POKKATH INDUSTRIES
   VALLAKUNNU, KALLETTUMKARA P.O.,
   IRINJALAKUDA, TRICHUR DISTRICT.

2. SMT.LISSY DAVIES, W/O.LATE P.V.DAVIES
   POKKATH HOUSE, IRINJALAKUDA, THRISSUR DISTRICT.

3. SHRI.P.V.JOSE, POKKATH HOUSE, IRINJALAKUDA
   TRICHUR DISTRICT.

4. M.R.DAVIES, MAPRANAM HOUSE
   OLLUR P.O., TRICHUR DISTRICT.

5. A.C.PAUL, AMBOOKKAN HOUSE,
   KUZHIKKATTUSSERY, (VIA) KALLETTUMKARA, TRICHUR DISTRICT.

6. K.J.ANTONY, KALLAMPARAMBIL HOUSE
   IRINJALAKUDA, TRICHUR DISTRICT.

7. T.I.ULLAS, THOLATH HOUSE
   GURUVAYUR ROAD, KUNNAMKULAM, TRICHUR DISTRICT.

BY ADV. SRI.R.RAMADAS

RESPONDENTS:
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1. CUSTOMS EXCISE GOLD (CONTROL) APPELLATE TRIBUNAL
   SHASTRI BHAVAN ANNEXE BUILDING, 1ST FLOOR, 26,
   HADDOWS ROAD, MADRAS-600 006.

2. COLLECTOR REDESIGNATED AS COMMISSIONER OF CENTRAL EXCISE
   I.S.PRESS ROAD, COCHIN.

3. THE SUPERINTENDENT OF CENTRAL EXCISE
   IRINJALAKUDA RANGE, TRICHUR DISTRICT.

BY ADV. SRI.JOHN VARGHESE, SCGSC
SRI.P.PARAMESWARAN NAIR,ASST.SOLICITOR

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 26/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP 16489/98

ORDER ON CMP NOS.29309/1998 AND 29368/1998 IN OP NO.16489/1998

DISMISSED

26.11.2007 SD/- P.R.RAMAN, JUDGE

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1: ORDER NO.74/88 PASSED BY R2 (COLLECTOR OF CENTRAL EXCISE) ASSESSING THE PETITIONER TO DUTY.

EXT.P2: CORRIGENDUM ISSUED BY THE 2ND RESPONDENT.

EXT.P2(a): REPLY TO THE SHOW CAUSE NOTICE FROM THE PETITIONER.

EXT.P2(b): COPY OF THE SHOW CAUSE FROM THE 1ST RESPONDENT.

EXT.P2(c): COPY OF THE APPEAL FILED BY THE PETITIONER.

EXT.P3: ORDER NO.2448 PASSED BY THE 1ST RESPONDENT (CEGAT), SOUTH ZONAL BENCH, MADRAS ON THE APPEAL NOS.E.SB/1320/89-1/W-E/SB 1320/89 1326 TO 1328, 1330, 1346 AND 1398/89 FILED BY THE PETITIONER. THIS WAS DESPATCHED TO THE PETITIONERS ONLY ON 25.9.1997.

EXT.P4: RECTIFICATION OF MISTAKES PETITIONS (ROM PETITION NO E/ROM.1160-1106/97 IN E/1320-1326, 1346, 1398/89.

EXT.P5: MISC ORDER NO.393-399/98 PASSED BY THE 1ST RESPONDENT DISMISSING THE ROM PETITIONS EXT. P4.

EXT.P6: CERTIFICATE OF REGISTRATION AS A SMALL SCALE INDUSTRIAL UNIT ISSUED POKKATH INDUSTRIES.

EXT.P7(a): DECLARATION TO EXCISE
P7(b) -DO-
P7(c) -DO-
P7(d) -DO-

EXT.P8: LETTER BY VARMA AND VARMA TO 1ST PETITIONER RE:PAYMENT OF LICENCE FEE TO SALES TAX DEPARTMENT.

EXT.P9: COPY OF CHALLAN FOR PAYMENT OF LICENCE FEE TO SALES TAX DEPARTMENT.

EXT.P10: DELIVERY NOTES IN FORM 26 UNDER RULES 32(17) AND 35(13) OF KERALA GENERAL SALES TAX RULES FOR TRANSFER OF GOODS MADE IN THE FACTORY TO THE SALES DEPOT AT IRINJALAKUDA.

EXT.P11: RETURN UNDER FORM NO.8 PRESENTED UNDER RULE 10(2) OF SERIES THE KGST RULES.

EXT.P12: TARIFF ENTRY 16(a) FOR 1984-85.

EXT.P13: TARIFF ITEM NO.16(A) 1985-86.

EXT.P14: TARIFF ITEM NO.C.H.40 1987-88.

EXT.P15: NOTIFICATION NO.72CE DATED 14.10.1972 AND 73CE DATED 1.3.1973.

EXT.P16: NOTIFICATION NO.83/83-C.E. DATED 1.3.1983

EXT.P17: NOTIFICATION NO.85/85 CE OF 17.3.1985.

EXT.P18: NOTIFICATION NO.183/85 CE DATED 9.8.1985.

EXT.P19: NOTIFICATION NO.184/85 DATED 9.8.1985.

EXT.P20: NOTIFICATION NO.232/85 CE DATED 14.11.1985.

EXT.P21: NOTIFICATION NO.45/87 C.E. DATED 1.3.1987.

EXT.P22: NOTIFICATION NO.130/87 DATED 29.4.1987.

EXT.P22(A): COPY OF INVOICE NO.16 ISSUED BY POKKATH INDUSTRIES TO MODERN HILL-MILLER TYRES.

EXT.P23: COPY OF CERTIFICATE ISSUED BY ASSISTANT ENGINEER P.W.D. ROAD SECTION.

EXT.P24: COPY OF MAHAZAR.

EXT.P25: COPY OF MAHAZAR WITH TRANSLATION.

EXT.P26: COPY OF THE LETTER NO.90/98 ISSUED BY THE CENTRAL EXCISE.

EXT.P26(a) : COPY OF THE RETRACTION OF THE 1ST PETITIONER WITH TRANSLATION.

EXT.P26(b): COPY OF THE RETRACTION OF THE 5TH PETITIONER WITH TRANSLATION.

EXT.P26(c) : COPY OF THE RETRATION OF THE 6TH PETITIONER WITH TRANSLATION.

EXT.P27: COPY OF THE S.S.I. CERTIFICATE.

EXT.P28: COPY OF THE STATEMENT SHOWING CENTRAL EXCISE DUTY PAID FOR THE RELEVANT YEARS.

EXT.P29:COPY OF THE REFERENCE APPLICATION BEFORE R1.

EXT.P29(a) : COPY OF ORDER DATED 22.1.1998 REF. ORDERS NOS. 14 TO 20/98.

EXT.30: COPY OF CROSS EXAMINATION OF K.L.JOHN DATED 12.4.1988.

EXT.30(a): COPY OF CROSS EXAMINATION OF K.L.JOHN DATED 12.4.88.

EXT.31: COPY OF CROSS EXAMINATION OF K:P.NAIR DATED 9.6.1988.

EXT.31(a) : COPY OF CROSS EXAMINATION OF A.K.ARAVINDAN DATED 9.6.1988.

RESPONDENT'S EXHIBITS:

EXT.32: COPY OF NOTICE NO.E/REF/218 TO 224/97.

/TRUE COPY/

P.A. TO JUDGE

P.R.RAMAN, J

O.P.No.16489 of 1998

Dated this the 26th day of November, 2007

JUDGMENT

The challenge made in this writ petition is against Exts.P1, P2, P2(b), P3, P5 and P26. The petitioners seek to issue appropriate writ order or direction quashing the same and to direct the respondents to refrain from implementing orders Exts.P1, P2, P2(b), P3, P5 and P26 and from taking proceedings pursuant thereto.

2. M/s.Pokkath Industries is a partnership firm established in 1971 with seven partners. It was engaged in the business of manufacture of tread rubber and garden hoses. The partnership firm was reconstituted in 1982 with three partners namely Mr.P.V.Varghese, Mr.P.V.Davis and Mr.P.V.Jose. In 1985 except Mr.P.V.Varghese, the other two partners Mr.Davies and Mr.Jose, retired and the firm thus became a proprietorship concern and continued with the business in the same name.

The unit was initially a small scale industry unit and the unit was entitled to exemption from the payment of excise duty. So however declarations were filed with prescribed details for the years 1984-85 to 1987-1988. It is the case of the petitioners that there was a sales depot maintained at Irinjalakuda town since 1982 onwards which was treated as a branch office of the company. Both the factory as well as sales depot were included in the registration certificate issued under the Kerala General Sales Tax Act. The manufactured good namely the Tread rubber concentrate came under item 16A(II) of the Schedule of Central Excise Act. Subsequently by Act 5 of 1986 the Central Excise Tariff Act 1985 came into force as per which the manufactured articles came under chapter 40 of Central Excise Tariff Act. During the relevant time to which the case relates, it is admitted that there is no exemption and the goods in question are assessable to excise duty.

3. On 11.6.1987, tread rubber belong to M/s.Pokkath Industries, manufactured in their factory, were seized by the

Central Excise Authorities. A quantity of 210 kgs. of tread rubber was carried in a car No.KLH6152 and was transported to one of its buyer Modern Hi-Miller Tyres, Kunnamkulam. The car was intercepted on the road. On finding the tread rubber in the car, the same was brought to the factory and that they were seized. The statement of the driver of the car Sri.K.J.Antony, the Manager of the factory Sri.Paul and the customer Mr.Davis were all taken by the Central Excise Officials. It was on 23.6.1987 the officer had seized 210 kgs. of tread rubber and also 278 kgs. of tread rubber kept in the factory inclusive of 160 kgs. tread rubber produced on the previous day and 128 kgs. produced on 23.6.1987. Copy of Ext. P24 mahazar under which the article was seized is produced in the case. The records kept in the factory were also seized. A search was also conducted in the residential premises of the first petitioner. The sales depot was also searched. The premises of the 7th petitioner at Kunnamkulam was also searched on 23.6.1987. 122 Invoices issued to Sri.Ullas, the 7th petitioner, by the proprietor of the

concern M/s.Pokkath Industries and 4 rolls of Tread Rubber weighing 106 kgs. were also seized.

4. After adjudication proceedings, the second respondent by Ext. P1 imposed a duty of Rs.11,94,807.56 and also imposed a penalty of Rs.20,000/- subsequently by Ext. P2 corrigendum order dated 30.12.1988 the penalty was enhanced to Rs.2lakhs . The petitioners replied by Exts. P2(a) and P2(b). After considering such reply and finding that the same is not satisfactory and on the basis of material available on record the authority confirmed the proposal. Thereafter the petitioners preferred an appeal to the first respondent Tribunal and the Tribunal by Ext. P3 order, which is produced in the case, confirmed the order levying the duty of Rs.11,94,807.56 on the petitioners and also confirmed original penalty of Rs.20,000/- but set aside the corrigendum order enhancing the penalty from Rs.20,000/- to Rs.2,00,000/-. The petitioners thereafter sought a rectification of that order by filing Ext. P4. But the Tribunal by Ext. P5 order dismissed the same. Challenging this orders and

aggrieved by such circumstances that the petitioners have approached this court by filing this writ petition. The learned Senior counsel Sri.Krishnanunni appearing on behalf of the petitioners interalia contended that the assessment of duty on the petitioners is based on conjunctures and surmises. According to him, the second respondent levied the duty on the assumption drawn from an unproved fact that the unit has purchased carbon black in fictitious name and manufactured tread rubber using the same but not accounted. The authorities below placed reliance on the statement given by Sri.K.L.John and Sri.P.Balakrishnan Nair even if they have not retracted from the statement given to the Excise Officials, their statements are not admission to be binding on a third party like the petitioner, so far as they are not fastened with any liability, those statement may be binding on them the statement maker but not on the manufacturer so their statement could at best be taken only as evidence and merely because they are not retracted, the evidentiary value of such statement given by them tested in the cross examination, has to

be evaluated before entering a finding. But the approach made by the authorities would clearly show that whatever statement given by these two persons were straight away accepted by the authorities and confirmed by the Tribunal on the sole ground that whatever their statement in the cross examination contrary to the earlier statement cannot be accepted for the mere reason that they have not retracted from their earlier statement. It was also contended that the quantity of tread rubber seized from the car was being sold to a Kunnamkulam party which was actually transported from the sale depot and the excise duty in respect of the same has already been paid. It is also his case that the then proprietor Mr.Varghese as well as the Manager Mr.Paul, has retracted from statement before the officials and as such statement given to the officers under vitiating circumstances cannot be accepted as a legal evidence for entering any finding adverse to them. It is further contended that nowhere Mr. Varghese or his Manager had admitted that any purchase has made in fictitious name and finding contra is perverse. The

Tribunal ought to have allowed the rectification sought for and granted relief after reconsidering the matter.

5. It is not disputed that the goods belonging to the unit and which being sold to Kunnamkulam party was intercepted while in transit. Even though the petitioner contended that the said goods subsequently seized were all subjected to payment of excise duty and were brought from the sale depot, there is no appreciable evidence in this regard. The statement given by Mr.Varghese, proprietor of the unit at the relevant time would clearly admit the fact that his own Manager had stated that these goods were manufactured in their own factory in respect of which no duty was paid. Even though Mr.Varghese subsequently filed a statement of retraction, I have perused the said retraction statement of Ext. P26(a) produced in the case. I find that in his earlier statement as to what has been told by his Manager has not been retracted. The authorities below have evaluated the evidence on record and having come to the conclusion that they have not paid any duty no interference is called for in respect of

the said finding in petition under Article 226 of the Constitution of India. Consequently any penalty imposed on the value sought to have been evaded cannot be said to be illegal. But in this case the levy of duty was not confined to the goods thus seized from the petitioners but based on inference drawn that the unit had manufactured larger quantities of tread rubber making use of the carbon black supplied by Mr.John and Balakrishnan Nair which has not been accounted for the purpose of excise duty. No doubt Mr.John and Balakrishnan Nair did not retract from their original statement. But then their statement may bind them but not the proprietary unit. Such statement given by third parties certainly can be taken as a piece of evidence after considering the evidentiary value of such statement tested in the cross examination. Admittedly, while they were cross examined they denied of their statement before the officials. If so based on their statement alone an inference may not be justifiable unless there are other supporting materials warranting such conclusion. There is nothing on record to show that the records maintained

by these two parties who have sold the carbon blacks to the petitioner unit were verified by the Excise Authorities to find any corroborating materials to their statement. It could have been easily proved by the payment details as to whether goods sold were actually paid by the unit concerned or by any of its partners or the Manager. No such investigation in this regard was conducted by the authorities. There is also no materials available on record as to the period during which such alleged sale of the carbon black was made to the petitioner unit and whether production during that relevant period was more compared to the previous period, whether there was any increase in the consumption of electricity to presume that the production was much more than accounted for and what is the normal quantity of manufacture using the machinery in question are further matters on which there is no evidence on record. Of course, the burden to produce these types of evidence lie on the petitioners as they are within their specific knowledge. But there is no primary materials to show that purchase were made by the unit

in fictitious name and gone for increased production and evaded payment of excise duty on such products. As already indicated except the sole statement of the two persons which has been demolished in the cross examination, there is no other independent material to support their statement. Hence, the finding entered by the Tribunal is perverse. The Tribunal failed to see that statement made by the two persons on whom no liability is fastened and are therefore, under no liability to retract. Hence, such statement of third parties cannot be the sole basis for imposing such huge amount of excise duty especially when their original statement were denied by them in the cross examination.

6. In the circumstances, Exts. P3 and P5 orders passed by the Customs, Excise & Customs Gold (Control) Appellate Tribunal are set aside. The matter is remitted to the Tribunal for fresh consideration in accordance with law after affording an opportunity of being heard to both the parties. I make it clear that the duty payable on the actual quantity already seized by

the Excise Department as well as the corresponding penalty that may be imposed on the value of such goods the payment of which is sought to be evaded are sustained. But in the absence of bifurcated figures, and in view of the fact as to whether the larger duty levied from the petitioners is sustainable in the eye of law to which purpose the matter is being remanded, the Tribunal shall consider all the aspects of the above matter and mould the relief accordingly.

The original petition is disposed of as above.

P.R.RAMAN,
JUDGE

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